A **PP**

v.

RUTININ SUHAIMIN

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RAVINTHRAN PARAMAGURU JC
[CRIMINAL APPEAL NO: K42-60-2010]
23 NOVEMBER 2012

C ***CYBER LAW:*** *Improper use of network facilities - Posting of offensive remark - Online visitor book - Whether communication made through a network facility - Whether communication made with intent to annoy, abuse, threaten or harass any person - Whether circumstantial evidence taken into consideration - Whether Internet Protocol address from which*
D *comment posted belonged to accused - Whether victim of offence must have actually felt annoyed or abused with remark - Communications and Multimedia Act 1998, s. 233*

E The accused was charged in the Sessions Court for committing an offence under s. 233 of the Communications and Multimedia Act 1998 ('the Act'). It was the prosecution's case that the accused had posted a remark on the online visitor book of the homepage of the HRH Sultan of Perak stating that the HRH Sultan of
F Perak was mad. The investigation commenced after a report was lodged by an information officer ('PW1') who was attached to the Perak State Secretary's office. According to PW1, the posting bore an internet protocol ('IP') address which was assigned to anyone using the internet by the internet service provider for a particular session on the internet. The other essential witnesses
G were from Telekom Malaysia Bhd ('Telekom') whereby they testified that the IP address from which the comment was posted belonged to the accused. Based on the circumstantial evidence that the computer with the media access control ('MAC') address which was used to make the posting was found in the accused's
H shop and the fact that the internet account belonged to the accused himself, the prosecution submitted that the accused had posted the offensive remark in question. However, the learned Sessions Court Judge ruled that the prosecution had failed to establish a *prima facie* case holding, *inter alia,* that (i) there was
I no direct evidence that the accused posted the said remark; (ii) the internet could have been accessed by anyone from the computer in question; and (iii) there was a break in the chain of

evidence when the computer was transported from the Kota Kinabalu Airport to KLIA as they were "checked in". The accused was acquitted at the end of the prosecution's case. Dissatisfied with the said decision, the prosecution appealed to this court.

Held (allowing appeal; ordering accused to enter his defence):

(1) The provision in s. 233(1)(b) of the Act is worded widely. The crucial ingredients of this offence are: (i) that the accused had made the communication in question through a network facility; and (ii) that the communication was made with intent to annoy, abuse, threaten or harass any person. (para 9)

(2) The learned Sessions Court judge failed to consider the strength of the circumstantial evidence in this case. Circumstantial evidence must be given due weight if it points irresistibly, inexorably and unerringly to the guilt of the accused. The circumstantial evidence came from PW1, the witnesses from Telekom and the forensic expert from Cybersecurity Malaysia. The user's IP address was captured by PW1 and this address when traced by Telekom showed that it was assigned to the accused's internet account at the time the communication was made. Further, witnesses from Telekom gave evidence that the internet account belonged to the accused. (para 12)

(3) There was no evidence that any other person used the computer at the time in question. The prosecution witnesses had correctly identified the computer that was seized and sent for analysis. It was not a requirement that an exhibit should remain in the sight of the investigating officer at all times. It was sufficient that he was able to identify from the label attached to it. Therefore, the fact that the computer was "checked in" was not ground for holding that there was a break in the chain of evidence. (paras 13 & 14)

(4) The accused was the owner of the shop and the holder of the internet account which was used to post the remark in question. Further, the transaction in question matched the MAC address of the computer that was found with an active internet connection in the accused's shop. The circumstantial evidence was sufficiently strong to conclude that the accused

had used the internet account that was registered in his name at the material time. In light of this, the accused was not required to rebut any statutory presumption but he was still required to raise a reasonable doubt that he was not responsible for the said posting. (paras 12 & 16)

(5) It could be inferred that the accused had intended to cause annoyance. However, it was unnecessary to call the victim of the annoying remark to the witness stand. Section 233(1)(b) of the Act does not state that the victim of the offence must actually feel annoyed or abused. The provision only states that the offender must have the intention to annoy or abuse. Hence, it was sufficient if the communication in question had the tendency to cause annoyance or abuse to any person. The prosecution has thus tendered sufficient inferential evidence to prove intention. As credible evidence in respect of all the ingredients of the offence had been adduced, the learned Sessions Court judge should have called for the defence. (paras 17 & 18)

Case(s) referred to:

Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 ***(refd)***

Sunny Ang v. PP [1965] 1 LNS 171 FC ***(refd)***

Legislation referred to:

Communications and Multimedia Act 1998, s. 233(1)(b)

For the appellant - Uma Devi Balasubramaniam; DPP

For the respondent - Muammar Julkarnain; M/s Jumahad Julkarnain & Ahmadshah

Reported by Kumitha Abd Majid

JUDGMENT

Ravinthran Paramaguru JC:

[1] This is an appeal by the prosecution against the discharge and acquittal of the accused at the end of the case for the prosecution.

Brief facts

[2] The accused was charged with committing an offence under s. 233 of the Communications and Multimedia Act 1998. The charge read as follows:

> Bahawa kamu pada 13/02/2009 jam lebih kurang 6.33 petang di alamat Blok A, Lot 4 kedai SEDCO 89300 Kundasang di dalam daerah Ranau dalam Negeri Sabah telah menggunakan perkhidmatan aplikasi iaitu Internet Protokol 60.52.46.189 secara sedar membuat dan memulakan penghantaran komen yang jelik sifatnya iaitu "Sultan Perak Sudah gilaaaaaaa!!!!!!" di *http://books.dreambook.com/duli/duli.html* yang mempunyai pautan laman web pejabat Duli Yang Maha Mulia Sultan Perak iaitu *http://sultan.perak.gov.my* dengan niat untuk menyakitkan hati orang lain. Oleh itu kamu telah melakukan satu kesalahan di bawah subseksyen 233(1)(a) Akta komunikasi dan Multimedia 1998 [Akta 588] dan boleh dihukum di bawah subseksyen 233(3) Akta yang sama.
>
> (Hukuman: Boleh didenda tidak melebihi lima puluh ribu ringgit atau dipenjarakan selama tempoh tidak melebihi satu tahun atau kedua-dua).

[3] The prosecution called 19 witness to established its case. The essence of the charge is that the accused had posted the remark "Sultan Perak Sudah gilaaaaaa!!!!" on the online visitor book of the homepage of the HRH Sultan of Perak. The online visitor book was hosted on the website address is *http://books.dreambook.com/duli/duli.html* and it was linked to the homepage of HRH Sultan of Perak which is hosted at *http://sultan.perak.gov.my*. The case was investigated by the Communications and Multimedia Commission. The investigation commenced after a report was lodged by PW1, who is an Information Officer attached to the Perak State Secretary's office. She testified that it is her duty to check all postings made on the online visitor book of the homepage of the HRH Sultan of Perak's website. She discovered that the offensive posting in question was time stamped 6.33pm and dated 13 February 2009. She found that the posting bore the Internet Protocol (IP) address 60.52.46.189. She said that the IP address is the unique address assigned to anyone using the internet by the internet service provider for a particular session on the internet. The other

A essential witnesses were from Telekom Malaysia Berhad. They testified that the Internet Protocol (IP) address from which the comment in question was posted belonged to the accused person. They also detected the Media Access Control (MAC) address of the computer that was used for the internet session in question
B when the offensive remark was posted. MAC address is the unique address that is given to a hardware device by the manufacturer. This address is used to interact with network devices. The accused runs a handphone shop in Ranau. The computer was recovered by the investigating officer from the shop.
C The computer was sent for forensic analysis to Cybersecurity Malaysia. The forensic expert recovered the MAC address from the said computer. The said MAC address matched the MAC address that was captured by the Telekom Malaysia Berhad servers during the internet session in question when the offensive
D remark was posted on the online visitor book of the homepage of HRH Sultan of Perak. The forensic expert said that the offensive words "Sultan Perak" and "gilaaaa!" could not be found in one of the two hard disks of the computer. The other hard disk had suffered mechanical failure and could be not powered up.
E However, he said that this is possible because it was not stored in the browser "cache". Nonetheless he said that the MAC address of the computer could be recovered.

[4] Based on the circumstantial evidence that the computer with
F the MAC address that was used to make the posting in question was found in the shop of the accused and the fact that the internet account belonged to the accused himself, the prosecution submitted that the accused must have posted the offensive remark in question.

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Findings Of Sessions Court Judge

[5] In his brief judgment, the learned Session Court Judge ruled that the prosecution failed to establish a *prima facie* case. His reasons can be summarised as follows:

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(a) That there is no direct evidence the accused posted the remark in question.

(b) The internet could have been accessed by anyone from the computer in question.

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(c) The workers of the accused who were called by the prosecution testified that there were others at the shop at the material time. He said the workers could not verify if the accused was at the shop at the material time the posting in question was made.

(d) Finally he held that the prosecution had not given sufficient evidence in respect of IP and MAC address "spoofing" which is actually impersonation of the IP and MAC addresses. Learned counsel for the accused had asked the Telekom Malaysia Berhad witnesses if "spoofing" is possible.

[6] At a later date which is not stated, the learned Sessions Court Judge gave further grounds:

(a) That there was a break in the chain of evidence in respect of the seizure of the exhibit, ie, the computer when it was transported from the Kota Kinabalu Airport to the KLIA as they were "checked in".

(b) The original box was not an exhibit.

(c) Details of the "check in" of the exhibits were not tendered.

(d) Witness statements taken at the time of the raid were not complete. The second set of witness statements were recorded much later. The quality of the recording of the statements was in doubt. The second set of statements was recorded at 10pm. Therefore witnesses could have been under pressure. There was also a question whether others had access to the computer.

(e) The investigation focused on "technicalities". There was no investigation on the sender of the offensive posting.

Grounds Of Appeal

[7] The primary ground of appeal is that the prosecution had adduced sufficient evidence to support the elements of the offence in question and therefore the Sessions Court Judge should have called for the defence of the accused.

A **Decision**

[8] Section 233(1)(b) of the Communications and Multimedia Act 1998 which is the offence creating provision reads as follows -

B 233. Improper use of network facilities or network service, etc.

(1) A person who -

C (b) initiates a communication using any applications service, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address, commits an offence.

[9] As can be seen above, this provision is worded widely. The D initiation of network usage need not be continuous. Therefore, a single instance of network usage would suffice. Communication need not necessarily ensue in the process. This means that a solitary posting of remark on a website which did not elicit a reply is caught by this provision. It is also not relevant whether the E accused had revealed his identity or otherwise during resession when the communication in question was made. The crucial ingredient of this offence is as follows:

(a) That the accused person had made the communication in question through a network facility.

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(b) The communication was made with "with intent to annoy, abuse, threaten or harass any person".

[10] The learned Sessions Court Judge should have therefore G considered whether:

(a) On the evidence adduced by the prosecution, whether direct or circumstantial, he could rule that the accused person initiated the communication in question.

H (b) Whether the communication in question, ie, "Sultan Perak Sudah gilaaaaaa!!!!" is either annoying or abusive.

(c) Whether the accused had intention to annoy or abuse any person.

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[11] After having considered all the arguments of the learned DPP and learned counsel for respondent, it is my opinion that this appeal should be allowed. My reasons are as follows: A

[12] The learned Sessions Court Judge adverted to the lack of direct evidence as fatal. He has erred in coming to the conclusion as he completely failed to consider the strength of the circumstantial evidence in this case. Circumstantial evidence must be given due weight if it point irresistibly, inexorably and unerringly to the guilt of the accused (see *Jayaraman Velayuthan & Ors v. PP* [1982] CLJ 464; [1982] CLJ (Rep) 130, *Sunny Ang v. PP* [1965] 1 LNS 171). The circumstance evidence in this case came from PW1, the Telekom Malaysia Berhad witnesses and the forensic expert from Cybersecurity Malaysia. As outlined in the summary of evidence, the prosecution witnesses testified virtually unchallenged that the offensive remark in question was posted on the visitor book of HRH Sultan of Perak's homepage. The user's IP address was captured by PW1. This IP address was traced by the internet service provider (Telekom Malaysia Berhad) as having been assigned to the internet account of the accused person at the time the communication was made. PW4, PW5, PW6 and PW12 from Telekom Malaysia Berhad gave evidence that the internet account belonged to the accused. Furthermore, the transaction in question matched the MAC address of the computer that was found with an active internet connection in the shop of the accused person. As recounted earlier, the MAC address is the unique address given by the manufacturer of a particular device. The evidence of the prosecution witnesses simply means that the communication was made from the internet account and the computer of the accused person. The learned Sessions Court Judge considered the submission that the IP and MAC addresses could have been spoofed (impersonated) and that sufficient evidence was not adduced on this point by the prosecution. My respectful view is that the learned Sessions Court Judge had erred in so holding. The prosecution is not obliged to speculate on potential defences. If there was any evidence of impersonation, it is up to the accused to tender evidence to support such a defence. In any event, the prosecution witnesses testified that it is not possible to spoof both the IP address and the MAC address at the same time. As there is no expert opinion evidence to the contrary, the learned Sessions Court Judge should have not considered the possibility of spoofing in the instant case at the end of the case for the prosecution. B C D E F G H I

[13] The learned Sessions Court Judge considered the presence of customers in the shop at the material time. However, PW13 who is an employee of the accused did not say in her statement taken during investigation that there were two other customers in the shop at the material time. She only mentioned the presence of customers in the shop at the trial. The accused himself did not mention during investigation that others could have posted the remark in question. There was no evidence that any other person used the computer at the time in question. The accused was present in the shop that evening. It was a handphone repair shop. It was not a cyber cafe whose computer account is open for public use. The employees of the accused did not say that they used the computer at the material time or had posted the remark in question. They also did not say that any particular customer had used the computer at the time in question.

[14] As for the alleged break in the chain of evidence, the prosecution witness had correctly identified the computer that was seized and sent for analysis. It is not a requirement that an exhibit should remain in the sight of the investigating officer at all times. It is sufficient that he is able to identify from the label attached to it. Therefore the fact that the computer was "checked in" is not a ground for holding that there was a break in the chain of evidence. For this reason, the failure to tender the outer box is not relevant also.

[15] As for the witness statements that were taken during the investigation after office hours, it should not have been an issue. The prosecution did not rely on the statement of the accused person or his employees to establish a *prima facie* case. They have relied on circumstantial evidence afforded by the online paper trail.

[16] The accused was the owner of the shop and the holder of the internet account which was used to post the remark in question. Although the new s. 114A does not apply to the instant case as the offensive remark was posted before 31 July 2012, the circumstantial evidence is sufficiently strong to conclude that the accused had used the internet account that was registered in his name at the material time. The accused is not required to rebut any statutory presumption but he is still required to raise a reasonable doubt that he was not responsible for the posting in question.

[17] As for evidence in respect of intention, it is always a matter of inference. From the fact that an offensive remark pertaining to the HRH Sultan of Perak had been posted on the online visitor book, it can be inferred that the accused had intended to cause annoyance. It is also unnecessary to call the victim of the annoying remark to the witness stand. Section 233(1)(b) does not say that the victim of the offence must actually feel annoyed or abused. The provision only says that the offender must have intention to annoy or abuse. Therefore it is sufficient if the communication in question has the tendency to cause annoyance or abuse to any person. The posting in question says that the HRH Sultan of Perak is "gila" (mad). Although, HRH was not called to testify, it is obvious that such a remark is intended to cause annoyance. Lest it be forgotten, the remark was not posted in a private internet chat session but on the online visitor book of the home page of HRH. Therefore, the prosecution had tendered sufficient inferential evidence to prove intention.

[18] As credible evidence in respect of all the ingredients of the offence had been adduced, the learned Sessions Court Judge should have called for the defence. In the premises, I shall allow the appeal and order the accused to enter his defence the said charge. As the learned Sessions Court Judge in question is on study leave, I direct that the parties appear before the lower court Registrar for a direction that another Sessions Court Judge continue with this case.